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CITATIONS

Cases—Continued

Statutes:

In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 63

PHILIP R. CONSOLO, PETITIONER

v.

FEDERAL MARITIME COMMISSION, UNITED STATES OF AMERICA, AND FLOTA MERCANTE GRANCOLOMBIANA, S. A.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES AND THE FEDERAL MARITIME COMMISSION

OPINIONS BELOW

The opinion of the court of appeals on the judgment under review (R. 686) is reported at 342 F. 2d 924. A previous opinion of that court, remanding the case to the Federal Maritime Commission (R. 651), is reported at 302 F. 2d 887. The Federal Maritime Board[1] issued two opinions prior to the first decision of the court of appeals: the first (R. 3) (which held

[1] The functions and duties of the Federal Maritime Board, so far as relevant to this case, were transferred to the Federal Maritime Commission on August 12, 1961 (Reorganization Plan No. 7 of 1961, 75 Stat. 840, 46 U.S.C. 1111, note).

that respondent Flota Mercante Grancolombiana, S. A., had violated the Shipping Act) is reported at 5 F.M.B. 633; the second (R. 265) (which assessed reparations for the injury caused Consolo by the violation) is reported at 6 F.M.B. 262. The opinion of the Federal Maritime Commission on remand from the court of appeals (R. 500) is reported at 7 F.M.C. 635.

JURISDICTION

The judgment of the court of appeals was entered on December 17, 1964 (R. 686). The petition for a writ of certiorari was filed on March 16, 1965, and granted on June 1, 1965 (R. 700; 381 U.S. 933). This Court's jurisdiction is invoked under 28 U.S.C. 1254(1) and 5 U.S.C. 1040.

QUESTIONS PRESENTED

The Federal Maritime Commission entered an order awarding reparations to a shipper who had been injured by the refusal of a common carrier by water to sell him shipping space. The refusal was discriminatory and violated the Shipping Act. The shipper filed a petition to review the Commission's order in the court of appeals, contending that the amount of reparations awarded was inadequate. The carrier thereafter filed its own petition, and also intervened in the shipper's review proceeding, requesting the court to set aside the Commission's order in its entirety. The questions presented are:

1. Whether in general a carrier may initiate an action to set aside a reparations order, or is limited to challenging the validity of such an order by way of defense in an action brought by the shipper to enforce the order.

2. Whether, assuming that the carrier may not initiate an action to set aside a reparations order, the court of appeals may nevertheless set it aside at the carrier's urging where the case is properly before the court on the shipper's petition to review the adequacy of the award.

3. Whether the Commission's determination in this case that considerations of equity did not justify withholding reparations from a shipper injured by a carrier's unlawful conduct was supported by substantial evidence.

STATUTES INVOLVED

The statutes involved are the Shipping Act, 1916, 39 Stat. 728, as amended, 46 U.S.C. 801 *et seq.*; the Administrative Orders Review Act of 1950 (Hobbs Act), 64 Stat. 1129, 5 U.S.C. 1031 *et seq.*; the Judicial Code, 28 U.S.C. 1 *et seq.*; and the Interstate Commerce Act, 24 Stat. 379, as amended, 49 U.S.C. 1 *et seq.* The pertinent parts of Sections 14, 16, 22, 29, 30, and 31 of the Shipping Act, Sections 2, 3 and 8 of the Hobbs Act, Sections 13(1), 16(1), 16(2), 16(3) and 16(12), of the Interstate Commerce Act, and Sections 1336, 1398, 2321, 2323, and 2325 of the Judicial Code are set forth in the Appendix.

STATEMENT

1. THE DISPUTE BETWEEN CONSOLO AND FLOTA AND THE INITIAL BOARD PROCEEDING

Philip B. Consolo (petitioner) is an importer of bananas from Ecuador. Flota Mercante Grancolombiana, S.A. (respondent) is a common carrier by water in the foreign commerce of the United States. Since

1955, Flota has operated several cargo vessels with reefer (refrigerated) space for carrying bananas. In July 1955 Flota entered into an exclusive contract with the Panama Ecuador Shipping Corporation to carry its bananas from Ecuador to the United States. The contract with Panama Ecuador granted it the entire reefer space on all of Flota's vessels for a two-year period with an option to renew the contract for an additional three-year period (R. 177, 183–184). The exclusive contract was executed after the Federal Maritime Board, in June 1953, had ruled that Flota's competitor, Grace Line, had violated the Shipping Act by failing to allocate its banana shipping space equitably among all qualified shippers (*Philip R. Consolo* v. *Grace Line Inc.,* 4 F.M.B. 293). The Board had reaffirmed this ruling (in *Banana Distributors, Inc.* v. *Grace Line Inc.,* 5 F.M.B. 278, decided April 29, 1957) when on May 22, 1957, aware of the decision (R. 152), Flota renewed its contract with Panama Ecuador (at higher rates and on somewhat different terms), granting the shipper the entire banana space on all of Flota's vessels, to the exclusion of all other shippers, for a three-year period ending July 19, 1960.

In August 1957 Consolo wrote Flota demanding "a fair and reasonable amount" of banana space. Referring to the *Banana Distributors* decision, *supra,* he stated that if his request was not granted he would be compelled to file a formal complaint (R. 208). Flota rejected this and a later such demand (R. 209). On October 30, 1957, after it had discussed the situation orally with the Maritime Board's staff but received (R. 188).

no ruling, Flota filed a petition for a declaratory order with the Board, requesting a determination ("after a full hearing and upon consideration of all the evidence") (R. 40) that it was not required under the *Banana Distributors* ruling to cancel its exclusive contract with Panama Ecuador. Two weeks later, Consolo filed a complaint with the Board, pursuant to Section 22 of the Shipping Act, seeking a determination that Flota's contract with Panama Ecuador was illegal under Sections 14 and 16 of the Act, and also reparations in the sum of $600,000, representing his damages for the past exclusion.[2] Flota requested the Board to delay any pre-trial conference until the appeal in *Banana Distributors* was decided (R. 61).[3] The Board did not accede to this request, and, after several delays either initiated or agreed to by Flota, consolidated Flota's petition with Consolo's complaint and set the case for hearing in November 1958.

2. THE BOARD'S DECISIONS

On June 22, 1959, the Board ruled that Flota's allocation of reefer space to Panama Ecuador to the exclusion of Consolo violated the Shipping Act (R.

[2] Consolo later amended his complaint to increase the figure to $850,000 (see R. 252).

[3] The Second Circuit did not decide the case until February 13, 1959, at which time it reversed and remanded to the Board (*Grace Line, Inc.* v. *Federal Maritime Board*, 263 F. 709 (C.A. 2)). On remand, the Board again concluded that Grace had violated its duties under the Shipping Act by failing to pro-rate its banana space amoung all qualified shippers, and this time the Second Circuit, on July 13, 1960, affirmed (*Grace Line, Inc.* v. *Federal Maritime Board*, 280 F. 2d 790 (C.A. 2), certiorari denied, 364 U.S. 933).

9–10), and ordered it to discontinue the exclusive contract with Panama Ecuador and to allocate its refrigerated space fairly among all qualified banana shippers (R. 11). Flota, pursuant to Section 2(c) of the Hobbs Act, petitioned the court below to set aside this order. The proceeding on this petition was held in abeyance pending the outcome of the second *Grace Line* appeal (see n. 3, *supra*).

Meanwhile the Board, subsequent to its decision of June 22, 1959, on the issue of violation, had held a separate hearing on the issue of reparations. The examiner had recommended an award of $259,812.26 plus six per cent interest from the date of arrival of each vessel from which Consolo had been excluded (R. 255–262). But the Board, by order of March 28, 1961, reduced the award to $143,370.98 (R. 280, 281). Consolo petitioned the court of appeals for a review of the Board's order, claiming that the amount of reparations was inadequate. Flota then filed a petition for review in the same court, asserting that Consolo was entitled to no reparations. Each intervened as of right (under Section 8 of the Hobbs Act) in the review proceeding commenced by the other's petition. Thus, the court now had before it the Board's order requiring Flota to grant Consolo reefer space, which Flota asked be set aside, and the reparations order, which Consolo asked be set aside in part as inadequate and Flota asked be set aside in its entirety.

3. THE COURT OF APPEALS' FIRST DECISION

The court held that the record adequately supported the Board's findings that operational difficulties and vessel limitations did not justify Flota's making an exclusive contract with a favored shipper, and that its discriminatory refusal of space was neither reasonable nor just (R. 658, 659). This aspect of the case is no longer in issue.

The court also held that it had jurisdiction to review not only the adequacy, but the validity, of the reparations order, reasoning that the Hobbs Act expressed a congressional determination that the party charged under such an order should be free to institute a proceeding in the court of appeals to challenge the order's validity (R. 662). The court also suggested that since "the case is properly here" on Consolo's review petition (as to which the court's jurisdiction was undisputed), "the order should be reviewable in its entirety, and the rights of all parties considered" (R. 661). On the merits of the reparations order, the court upheld the Board's rulings reducing the amount of the award (R. 663, 664), but thought that the Board had failed to give adequate consideration to whether it was, in the circumstances, equitable to require the payment of any reparations, and remanded the case to the Board for reconsideration of this issue (R. 665–667).

4. THE BOARD'S DECISION AFTER REMAND

On remand, the Commission (see n. 1, *supra*, p. 1) concluded that it was not inequitable to require Flota to pay Consolo reparations, although it further reduced

the amount of the award from $143,370.98 to $106,001.00 (R. 501–514). In reaching this conclusion, the Commission weighed the following circumstances to which the court had directed its attention.

The "unsettled nature of the law." The Commission noted that Flota, when it renewed its exclusive contract with Panama Ecuador, had acted in disregard of two Board decisions directly in point, one rendered only a month before Flota executed the renewal contract. In these decisions the Board had held, after a study in depth of banana carriage, that a common carrier could not exclude qualified shippers. Flota chose nevertheless to execute the renewal contract, the Commission found, "because it preferred the advantages of its long-term, exclusive arrangement with Panama Ecuador" (R. 506).

The physical differences between Flota's vessels and the Grace Line's. The court had indicated that these differences might well have led to the conclusion that Flota "in good faith believed" that its discrimination, unlike Grace Line's, was not unreasonable (R. 665). But the Commission found that Flota had not sought to explore means of solving the problem of accommodating several shippers; it had "simply preferred its existing one-shipper arrangement" (R. 506).

The reasonableness of the three-year contract under the Grace Line decision. The Board in the *Grace Line* case had authorized forward-booking contracts with shippers not to exceed two years, leading the court to speculate that Flota's renewal of its contract with Panama Ecuador for three years "may well

have seemed to be * * * a reasonable period of time" (R. 666). The Commission pointed out that under the *Grace Line* rule the duration of the contract is not relevant until the carrier has first equitably apportioned the available space among qualified shippers, and that "Flota made no attempt to prorate its available space" (R. 510).

Flota's petition for a declaratory order and the Board's asserted delay in ruling thereon. The Commission noted that Flota's petition had not been filed until October 30, 1957—five months after Flota had renewed its exclusive contract with Panama Ecuador. Since Flota had already violated the Act when it filed its petition, it was not honestly seeking guidance as to the applicability of the Board's *Grace Line* decision. As for the delay assertedly arising from the Board's refusal to proceed on Flota's petition independently of the complaints which had been filed by Consolo and another shipper, the Commission stated that consolidation had been proper in the circumstances, and that Flota had, in any event, suffered no prejudice, since its petition, even standing alone, "would have offered no promise of a speedy resolution of the controversy" (R. 508). The Commission also pointed out that the cases had been decided by the Board with "unusual dispatch, considering the controversial nature and size of the record" (R. 509), and that the record did not support the claim that Flota had sought a prompt determination since Flota either "authored or favored" most of the requests for postponements that were made (R. 509).

5. THE COURT OF APPEALS' SECOND DECISION

Both Flota and Consolo again petitioned for review, Flota maintaining that no reparations whatever should have been assessed against it, and Consolo challenging the amount of the award as too low. The court reversed once more, and this time it directed the Commission to vacate its reparations order (R. 687–698). The court found that Flota had acted upon the basis of "reasonable doubt" as to whether its three-year renewal contract with Panama Ecuador was prohibited by the Shipping Act, and, uncertain of its legal obligation to cancel the contract, faced with demands for space by Consolo and other shippers, and threatened by Panama Ecuador with suit for breach of contract if it gave them some of Panama Ecuador's space, Flota had acted in good faith when it petitioned the Board for a declaratory order as to whether it must cancel its contract with Panama Ecuador. The court further found that the Board did not act expeditiously on that petition, noting that it did not assign a docket number to it until May 1, 1958, and then consolidated Flota's petition with Consolo's complaint, although the latter sought not only an adjudication that Flota was required to prorate reefer space among all qualified shippers but also reparations; and that the Board's opinion and order had not been handed down until June 22, 1959. Since the period for which reparations were granted extended from August 23, 1957, to July 12, 1959, the Board, in the court's view, was compelling Flota to pay reparations for virtually the entire period dur-

ing which Flota's petition for a declaratory order had been pending.

In weighing the equities, the court also observed that the only loss suffered by Consolo was his loss of unrealized profits, that there was no evidence that Flota had benefited by excluding Consolo, and that Consolo's position was "hardly deserving of greater sympathy than Flota's", since Consolo had himself been the beneficiary of a preferential arrangement with Grace Line, which the Board in April 1957 had held unlawful (R. 698).

SUMMARY OF ARGUMENT

I

Most Maritime Commission orders are enforceable by the agency itself. Concededly, such orders are judicially reviewable by means of proceedings brought by the aggrieved party against the agency to set aside the order. Reparations orders, however, are exceptional. They are not enforceable by the agency; nor is the party charged subject to any penalty or sanction for failure to comply. Instead, the beneficiary of such an order is specially empowered to bring a damages action to enforce it, and he is given certain special procedural advantages in the action, such as choice of venue. The distinctive procedure for enforcing reparations orders reflects a belief by Congress that such orders are generally of less public importance than other orders issued by the agency—a reparations proceeding being an essentially private controversy between (in the usual case) a shipper and a carrier. Because the agency typically lacks a direct

and substantial concern in the outcome of such proceedings, complete responsibility for enforcement is placed in the private party in whose favor the reparations award runs. It is to make it practicable for shippers—who as a class suffer from serious handicaps in litigation with carriers—to carry such a burden of enforcement, that Congress has given the shipper a procedural edge in the enforcement action.

Congress' scheme for making shippers exclusively responsible for enforcing reparations orders would be seriously undermined by holding that the carrier, in addition to being able to assert his defenses in the enforcement action, could, as in the case of other agency orders,[4] bring an independent judicial proceeding to set aside a reparations order; for, if such an action lay, the agency would be directly injected into the defense of the reparations case, as respondent in the review action brought by the carrier. And since the principal issues of the enforcement action would normally be finally determined in the review proceeding, the shipper would effectively be deprived of the procedural advantages that Congress gave him in the enforcement action. The provision for an enforcement action would become a dead letter, and Congress' careful distinction between reparations and other orders would disappear.

If, on the other hand, the carrier is limited to defending the enforcement action, it still may obtain plenary judicial review of the repara-

[4] For example, the Board's order (no longer in issue) directing Flota to grant Consolo reefer space.

tions order. The enforcement action is designed as a single trial and appeal procedure in which all of the issues relevant to the enforceability of the order may be determined fairly and expeditiously.

II

A different result is called for, however, where the carrier seeks to set aside the agency's reparations order, not in an independent review proceeding, but by way of defense to a review proceeding brought by the shipper to increase the amount of reparations awarded by the agency. The shipper's petition properly invokes the jurisdiction of the reviewing court; and ancillary jurisdiction to set aside the order in its entirety at the urging of the carrier is supported by considerations of procedural economy and fairness, and not opposed by the policies of the Shipping Act.

III

Turning to the merits, we note that whether or not it is ever permissible for the Maritime Commission to decline to award reparations in a case where it has adjudged the carrier guilty of a law violation causing injury to the complaining shipper, here the Commission, finding that the equities did not justify withholding reparations, awarded reparations to Consolo. The court of appeals erred in holding that this finding was unsupported by substantial evidence. Flota took a calculated risk in disregarding prior Board decisions indicating that its treatment of Flota would be unlawful; the Board acted promptly to determine

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the legality of Flota's conduct; and, in sum, the equitable factors pointed toward granting, not withholding, reparations.

ARGUMENT

I

IN GENERAL, A CARRIER MAY NOT BRING A PROCEEDING TO REVIEW A REPARATIONS ORDER OF THE MARITIME COMMISSION; IT MAY OBTAIN JUDICIAL REVIEW OF SUCH AN ORDER ONLY BY WAY OF ASSERTING THE ORDER'S INVALIDITY IN A SHIPPER'S ACTION TO ENFORCE IT

A. Introduction and Background

We think it will promote clarity to preface this part of our argument with a brief discussion of (1) the relationship of the present issue to that of a pending case in this Court dealing with reparations orders of the Interstate Commerce Commission, and (2) the nature and structure of a typical reparations proceeding as defined by statute and agency practice.

1. THIS JURISDICTIONAL QUESTION IS IDENTICAL TO THAT PRESENTED BY REPARATIONS ORDERS OF THE INTERSTATE COMMERCE COMMISSION

Section 1336 of the Judicial Code and Section 31 of the Shipping Act provide that actions to enforce or set aside orders of the Interstate Commerce and Federal Maritime Commissions, respectively, shall be brought in the federal district courts. However, Section 16(2) of the Interstate Commerce Act and Section 30 of the Shipping Act provide that reparations orders may be enforced by damage actions brought

in State or federal district courts by the beneficiary of the award (normally, a shipper) against the person directed to pay (normally, a carrier). In our brief in *Interstate Commerce Commission* v. *Atlantic Coast Line R. Co.*, No. 14, this Term, we contend that Section 16(2) provides the exclusive method of reviewing ICC reparations orders, and that the carrier may not challenge such an order by bringing a Section 1336 proceeding to set it aside; in view of the substantial identity of the relevant statutory provisions, the fact that the provisions relating to Maritime Commission orders were modeled on those relating to ICC orders, the close parallel in the policies and procedures of the two agencies, and the absence of considerations requiring a different result, we reach the same conclusion with respect to the Maritime Commission's orders.

We need pause only briefly to consider the argument that the Hobbs Act, passed in 1950, dictates a different result in this case from *Atlantic.* Congress provided in Section 2(c) of the Act that actions to enjoin or set aside orders reviewable under Section 31 of the Shipping Act should henceforth be brought in the federal courts of appeals rather than the federal district courts. The court below reasoned that the Hobbs Act expressed a congressional purpose to make all Maritime Commission orders, including reparations orders, reviewable in the same fashion—that is, by a review proceeding in the appropriate court of appeals. This reasoning ignores both the policy and the clear language of Section 2(c).

(1) In providing for direct review of agency action in the courts of appeals rather than the district courts, Congress had three objectives in mind: first, to eliminate the necessity of having two trial-type proceedings, one before the agency and the other before the court, "thus going over the same ground twice"; second, to eliminate the requirement of three-judge district courts for the review of administrative orders; and third, to eliminate the right of direct appeal from the reviewing court to this Court and to substitute discretionary certiorari review. S. Rep. No. 2618, 81st Cong. 2d Sess., pp. 4–5; H. Rep. No. 2122, 81st Cong., 2d Sess., pp. 3–4.

None of these considerations applies to the review of reparations orders. Where review of such orders is available at all, it is in a one-judge district court with no right of direct appeal to this Court. *United States* v. *Interstate Commerce Commission,* 337 U.S. 426. And shifting such review to the courts of appeals could not avoid two proceedings: if a reparations order is upheld on review, it must still be enforced in a separate district court enforcement action brought by the shipper.

(2) Congress did not provide in Section 2(c) that *all* Commission orders would be reviewable in the courts of appeals—only those formerly reviewable under Section 31 of the Shipping Act. In merely substituting court of appeals for district court review of such orders, Congress did not enlarge the scope of that section. Hence, the true inquiry is whether reparations orders are within the scope of Section 31.

This question—on which the Hobbs Act sheds no light—is the same[5] as whether 28 U.S.C. 1336 embraces actions to set aside ICC reparations orders.

Accordingly, in the following discussion, we will in the main be using such general terms as "the agency" (meaning either the Maritime Commission or the ICC), "the enforcement action" (meaning a shipper's suit, either under Section 30 of the Shipping Act or under Section 16(2) of the Interstate Commerce Act, to enforce the agency's reparations order), and "the direct review action" (meaning an action brought by the carrier, either under Section 2(c) of the Hobbs Act or under 28 U.S.C. 1336, to set aside the agency's order). Where there is a material difference between the powers or procedures of the two agencies, we will of course so indicate. We emphasize that in this part of our brief we are concerned with the question whether the carrier has a general right to sue to set aside a reparations order, not whether the carrier may attack the validity of such an order in a proceeding, in which it intervenes, brought by the shipper to review the adequacy of the order. We postpone to a later section of the brief the contention that, though it lacks the general right, the carrier does have this more limited right.

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[5] The "except as otherwise provided" clause in Section 31 of the Shipping Act does not add to or subtract from the jurisdiction of the reviewing court over Maritime Commission as compared to ICC orders; the clause was designed merely to broaden venue in Maritime Commission cases. H. Rep. No. 659, 64th Cong., 1st Sess., p. 34; S. Rep. No. 689, 64th Cong., 1st Sess., p. 14.

2. THE NATURE OF A REPARATIONS PROCEEDING

Suppose that a shipper feels that he has been injured by reason of a common carrier's breach of its statutory duties. If efforts at informal redress are not successful, he may file a formal complaint with the agency against the carrier.[6] The action on the complaint proceeds much like an ordinary civil damages action. The shipper bears the burden of prosecution and the carrier of defense. Agency personnel normally do not assist either party in the conduct of the proceeding or take an independent position.[7] All the agency provides is the tribunal—in effect, a specialized court—for adjudicating the controversy

[6] Section 22 of the Shipping Act provides: "Any person may file with the Federal Maritime Board a sworn statement setting forth any violation of this chapter by a common carrier by water * * * and asking reparation for the injury, if any, caused thereby. * * * The Board, if the complaint is filed within two years after the cause of action accrued, may direct the payment, on or before a day named, of full reparation to the complainant for the injury caused by such violation." Section 13(1) of the Interstate Commerce Act provides: "Any person * * * complaining of anything done or omitted to be done by any common carrier subject to the provisions of this chapter in contravention of the provisions thereof, may apply to" the ICC. And Section 16(1) provides: "If, after hearing on a complaint made as provided in section 13 of this title, the Commission shall determine that any party complainant is entitled to an award of damages under the provisions of this chapter for a violation thereof, the Commission shall make an order directing the carrier to pay to the complainant the sum to which he is entitled on or before a day named."

[7] Though the public counsel section of the Maritime Commission, at least, may participate in the liability (as opposed to damages) phase of the proceeding in a case where the liability question is of general importance.

between the parties. When the trial phase of the proceeding is over, the agency renders its judgment. It either finds that the carrier acted unlawfully and that the shipper was injured thereby, and enters an order directing the carrier to pay reparations representing the shipper's damages, or it denies reparations.

If reparations are denied, or granted in a smaller amount than the shipper claimed, he may bring a direct review proceeding (under 28 U.S.C. 1336 or Section 2(c) of the Hobbs Act, as the case may be) in the appropriate forum to set aside the order of denial, or to set aside in part (on the ground that it is inadequate) the order granting reparations. *United States* v. *Interstate Commerce Commission*, 337 U.S. 426; *D. L. Piazza Co.* v. *West Coast Line*, 210 F. 2d 947 (C.A. 2), certiorari denied, 348 U.S. 839. If the agency awards reparations, its order, unlike other orders issued by the agency (*e.g.*, an order prescribing a rate for the future), is not enforceable by the agency itself;[8] nor is there any direct sanction applied to the carrier if it fails to obey. The carrier is thus under no compulsion to pay the

[8] Section 29 of the Shipping Act provides: "In case of violation of any order of the Federal Maritime Board, other than an order for the payment of money, the Board, or any party injured by such violation, or the Attorney General, may apply to a district court having jurisdiction of the parties; and if, after hearing, the court determines that the order was regularly made and duly issued, it shall enforce obedience thereto by a writ of injunction or other proper process". Section 16(12) of the Interstate Commerce Act provides similarly with respect to ICC orders.

award unless and until the shipper brings an enforcement action under Section 30 of the Shipping Act or Section 16(2) of the Interstate Commerce Act. This action is a specialized proceeding not applicable to other orders. It must be brought within one year of the date of the agency's order.[9] The shipper has a broad choice of venue. Moreover, if he chooses a federal district court, he is not liable for costs (except as they accrue on his appeal), he is entitled to a reasonable attorney's fee (paid by the carrier)if he prevails, and, in addition, the agency's findings and order are *prima facie* evidence of the facts determined therein. The action may also be brought in a State court of general jurisdiction, although the plaintiff is not there entitled to all the same special procedural advantages.

Underlying the distinct court procedures established by Congress is a basic difference between reparations orders, which provide a retrospective, damages-type remedy, and other orders of the agency, which provide prospective relief. To be sure, as the present case illustrates, the same proceeding, involving a single practice, may result in both a reparations order and an order prescribing future conduct. But the orders are distinct. The former adjudicates only the past lawfulness of the conduct, awarding damages for any injury inflicted; it has no continuing significance after the expiration of the one-year period allowed for enforcement. The latter determines the current and future legality of the practice.

[9] See Section 16(3) of the Interstate Commerce Act; Section 30 of the Shipping Act.

Where the problem is one of prescribing or regulating the practices of carriers for the future, the agency plays an affirmative role in fashioning an order and enforcing it. But where the problem is to make whole a shipper injured by what the carrier did in the past, the agency plays a more passive role. It provides the tribunal to determine in the first instance whether the shipper is entitled to damages, but it is up to the shipper both to prosecute the action before the agency at his own expense and to secure enforcement of the agency's order. For the primary task of a regulatory agency is to guide and direct the practices of the businessmen subject to its jurisdiction. It is only secondarily concerned with redressing the injuries that businessmen may sustain by reason of violation of the statutes it administers. The problem of redress is more in the nature of a private dispute between shipper and carrier, though it arises within the general framework of the agency's responsibilities. The agency merely "affords a private administrative remedy" for "violation of the private right" to redress created by the Interstate Commerce Act or the Shipping Act. *Federal Trade Commission* v. *Klesner,* 280 U.S. 19, 26; see *id.,* pp. 26–27, n. 3; *Amalgamated Workers* v. *Edison Co.,* 309 U.S. 261, 268–269. Whether a particular shipper was overcharged under a rate no longer in effect is plainly less significant, in terms of the agency's responsibility for regulating commerce in the public interest, than whether a particular rate should be approved that will govern all shippers now and for an indefinite

period in the future. This is the reason why reparations orders of the ICC, where reviewable at all in a direct review proceeding, are reviewable before a single federal district judge, not, as in the case of other orders, by a three-judge court. *United States* v. *Interstate Commerce Commission,* 337 U.S. 426; see 28 U.S.C. 2321, 2325.

In placing on the shipper full responsibility for enforcing reparations orders, Congress was not unaware that shippers as a class are weaker than carriers, and hence likely to be at a disadvantage in a proceeding where the shipper stands alone, unassisted by the agency; and that the typical reparations claim is too small to warrant expensive enforcement proceedings. To make it feasible for the shipper to enforce such orders, Congress provided him with significant procedural "breaks" in the enforcement action—especially choice of venue, a reasonable attorney's fee if he won, and the use of the agency's findings and order to prove his *prima facie* case.[10] The small shipper can, in consequence, usually sue in his home district; and if his cause is meritorious, obtaining a judgment should not be an expensive, protracted or uncertain undertaking for him, since he can recover the costs of litigation and need not prove the facts

[10] This Court has observed that Section 16(2) is designed to discourage "harassing resistance by a carrier to a reparation order" (*St. Louis & S.F.R.R.* v. *Spiller*, 275 U.S. 156, 159). See, also, *Baldwin* v. *Milling Co.*, 307 U.S. 478.

already found in the agency proceeding.[11] But for these procedural assists to the shipper, the agency might have to assume enforcement responsibility for reparations orders itself, thereby impeding it in the performance of its more important regulatory functions.

The careful statutory design for the enforcement of reparations orders would be seriously disrupted if the provisions for direct review of agency orders[12] were construed to permit the carrier to sue to set aside a reparations order.[13] As we show presently, the posi-

[11] To bring an enforcement action under Section 16(2) of the Interstate Commerce Act, it is not necessary that a shipper have participated in the agency proceeding or been named in the reparations order. *Phillips* v. *Grand Trunk W. Ry.*, 236 U.S. 662. In addition, under both Acts, other shippers besides the one bringing the enforcement action may be joined as plaintiffs, and any additional carriers charged under the reparations order may be joined as defendants regardless of their place of residence. See Section 30 of the Shipping Act; Section 16(4) of the Interstate Commerce Act.

[12] Section 2(c) of the Hobbs Act (formerly Section 31 of the Shipping Act), in the case of Maritime Commission orders, and 28 U.S.C. 1336, in the case of ICC orders.

[13] We have explained at length in our brief in the *Atlantic Coast Line R. Co.* case, No. 14, this Term, that the legislative history of 28 U.S.C. 1336 and its predecessor provisions (on which Section 31 of the Shipping Act was modeled) discloses no intent to include reparations orders, traditionally governed by the distinct enforcement procedure; and that until very recently it was well understood that in fact such orders were not reviewable under these provisions. We do not repeat

tion of the court below, which would assimilate reparations orders to other agency orders for purposes of direct review actions, (1) produces anomalous and inequitable results, while (2) no such results follow from denying the carrier a right of direct attack upon such orders.

B. The position of the court below is inconsistent with the congressional language and intent

1. Our major focus is on considerations of policy. But we pause to note that the position of the court below (that a carrier may sue to set aside a reparations order) is not even consistent with the language of the statute. It makes nonsense of the provision that gives reparations orders *prima facie* effect in the enforcement action. Suppose that a carrier were permitted to bring a proceeding to set aside a reparations order, and did so but lost. It would be anomalous to give the agency's order—upheld by the reviewing court—only *prima facie* effect in a later action by a shipper to enforce the order. If permitted to sue directly to set aside a reparations order, surely the carrier should be deemed bound by the determination of the reviewing court which it invited, and the order, therefore, given conclusive effect in any later enforcement action. But this result

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these arguments here, but instead concentrate on showing (1) that deeming such orders included would disrupt the delicate machinery established by Congress to distinguish reparations from other kinds of proceedings, and (2) that the enforcement action provides a wholly adequate procedure wherein the carrier may challenge the validity of the agency's orders. We emphasize these points here because they are vigorously argued in the Brief of the Respondents in the *Atlantic* case.

seems barred by the language of the enforcement statutes, which speak of *prima facie,* not conclusive, effect. That leaves the manifestly unacceptable alternative, which Congress could not have intended, of permitting the carrier to rebut anew the court's decree upholding the agency. Such a procedure would in effect give the carrier two proceedings to review the same issues.

2. If a carrier were permitted to bring a direct review action to challenge a reparations order, theoretically, at least, the shipper would not need to participate in the action. He could rely on the agency to defend the order, and then, if the order was upheld, institute (or resume—see p. 27, *infra*) his action to enforce it. As we have seen, however, the interest in granting redress to injured shippers is considered primarily a matter of concern to the private parties involved, rather than of sufficient public interest to require participation by the agency as a party. Congress sought to relieve the agency of responsibility for enforcing such orders, in contrast to those having a general and continuing significance, which are enforceable by the agency and which, all agree, are subject to challenge in direct review proceedings. In view of the attenuated nature of the agency's interest, a shipper awarded reparations might well conclude that he must participate in the carrier's direct review action to protect his interest, rather than rely exclusively on what perhaps might be a *pro forma* defense by the agency.

There is an inescapable dilemma here. Either the agency assumes complete responsibility for the de-

fense of reparations orders, in which event the congressional design to keep the agency out of direct involvement in the enforcement of such actions is destroyed,[14] or the agency does not assume such responsibility and the shipper is thereby compelled to intervene [15] in the direct review action, with the result (as now we demonstrate) that the enforcement action, with its special procedural advantages for shippers, becomes a dead letter.

Assuming that the shipper will ordinarily deem it necessary or prudent to participate in the direct review action brought by the carrier, it will require not one action to enforce the order—as Congress provided—but two. In the first, ordinarily the crucial, action (intervention in the carrier's proceeding) the shipper is denied the advantages that Congress determined he needed to support the burden of enforcing a reparations order. The choice of venue is not his, but the carrier's;[16] this might be a source of real hardship

[14] It seems particularly incongruous to award the shipper his attorney's fees in the enforcement action when the real burden of enforcement is assumed not by the shipper but by the agency in defending the reparations order in the carrier's direct review proceeding.

[15] As he may as a matter of right. 28 U.S.C. 2323; 5 U.S.C. 1038.

[16] 28 U.S.C. 1398, which governs the venue of direct review actions brought under 28 U.S.C. 1336, would permit the carrier to sue in the district of its residence or principal office—which might, of course, be remote from the shipper's home district. The venue provision under the Hobbs Act, 5 U.S.C. 1033, would permit the carrier bringing a direct review proceeding to sue in the circuit of its residence or principal place of business or in the District of Columbia.

for the small, localized shipper. Moreover, in the first action the shipper is not excused from costs, and he is not entitled to any attorney's fee if he prevails; this would likely deter most shippers from pressing their typically modest claims. And even if the order is upheld, the carrier need not pay; the shipper must still bring an enforcement action to collect. The process of enforcement thus becomes far more onerous than Congress contemplated. This multiplication of burdens destroys the balance between shipper and carrier that Congress struck when it placed on the shipper himself the full responsibility for enforcing reparations orders.

The irrationality and unfairness of the double enforcement procedure that the court below sanctioned is underlined by the fact that there is no time limit on bringing a direct review proceeding to challenge an ICC order. Cf. 28 U.S.C. 1336(c).[17] A carrier could bring such a proceeding while the shipper's enforcement action was *in medias res,* thereby disrupting the action and delaying its completion by forcing the shipper to defend the order in a separate action in perhaps a far distant forum.

The only way the shipper could avoid the burden of two separate proceedings to obtain enforcement would be by counterclaiming for damages in the

[17] There is a 60-day limit in the case of Maritime Commission orders. See Hobbs Act, § 4.

direct review proceeding.[18] If the shipper thus is forced to bring his enforcement action in the direct review court, the practical result is that the enforcement action is instituted not by the shipper but by the carrier. The choice of timing and venue is the carrier's, not the shipper's. Under such a procedure, the enforcement action carefully provided by Congress is read out of the statute.

C. Limiting the Carrier to Defending in the Enforcement Action Fully Protects Its Right to Judicial Review

We have tried to show that permitting the carrier to bring a proceeding to set aside a reparations order would be contrary to the congressional design in establishing special procedures for the enforcement of such orders. To complete our argument, it is necessary to show that the carrier can obtain complete judicial review of the reparations order in the enforcement action. For it would not be tenable to impute to Congress an intent to deny the carrier such review altogether, which would be the result if the carrier could not bring a direct review proceeding *and* could not raise in the enforcement action all defenses he may have to the order, including the defense that the order is invalid because the agency's finding of

[18] Even this option may not be open in the case of Maritime Commission orders. Any direct review proceeding would, by virtue of Section 2(c) of the Hobbs Act, have to be brought in a court of appeals; and the courts of appeals do not have jurisdiction to entertain enforcement actions or award damages. It seems doubtful that principles of ancillary jurisdiction (see pp. 38, 39, *infra*) would support permitting a counterclaim for damages to be maintained in a court of appeals.

illegality was erroneous in law or unsupported by substantial evidence.

We think it is plain that the carrier is entitled to complete judicial review of the reparations order in the enforcement action. We show (1) that this Court, without expressly deciding the point, has consistently so assumed, and (2) that the enforcement action provides an entirely appropriate forum for the carrier to challenge the validity of the reparations order.

1. This Court has stated unequivocally that the enforcement action is a "one-judge trial and appeal procedure" (*United States* v. *Interstate Commerce Commission,* 337 U.S. 426, 443) which provides the carrier with "complete judicial review of adverse reparation orders" (p. 435). To the same effect, see *Meeker & Co.* v. *Lehigh Valley R.R. Co.,* 236 U.S. 412, 430; *H. K. Porter Co.* v. *Central Vermont Ry.,* 366 U.S. 272, 274, n. 6; and *Roberto Hernandez, Inc.* v. *Arnold Bernstein,* 116 F. 2d 849 (C.A. 2), the last applying this principle to enforcement actions based on Maritime Commission orders. Neither *Pennsylvania R. Co.* v. *United States,* 363 U.S. 202, nor *Mitchell Coal Co.* v. *Pennsylvania R.R. Co.,* 230 U.S. 247, are inconsistent with these statements of this Court. In the former case, the carrier had brought a damages action against the United States (the shipper) in the Court of Claims. As required by primary-jurisdiction principles (see, *e.g., United States* v. *Western Pac. R. Co.,* 352 U.S. 59), the court referred the question of whether the carrier had violated the

Interstate Commerce Act to the ICC. This Court held that the Commission's determination of this question was judicially reviewable. The next issue for the Court was where the determination was reviewable. Since it was settled that the Court of Claims had no jurisdiction to review it (see *United States* v. *Jones*, 336 U.S. 641),[19] the only alternative, and the one adopted by the Court, was to permit the carrier to bring a direct review proceeding to set the order aside. We shall show that in the present case, in contrast, there is no obstacle to review in the enforcement court. Moreover, as we have noted, the congressional objectives in establishing the distinctive reparations procedure can be achieved only by limiting review to the enforcement court.

Mitchell Coal Co. v. *Pennsylvania R.R. Co.*, 230 U.S. 247, did not hold—as respondents in the *Atlantic Coast Line* case, taking language of the Court out of context, maintain[20]—that the enforcement court cannot review the agency's determination underlying the reparations order. In *Mitchell*, no reparations order had been entered by the Commission. The shipper, without any prior administrative finding that the carrier had charged an illegal rate, sued the carrier directly for damages.[21] Under settled principles, the

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[19] This is no longer true. See p. 35, *infra*.

[20] See Brief for Respondents, No. 14, this Term, pp. 22–23.

[21] Section 9 of the Interstate Commerce Act provides that any person "claiming to be damaged by any common carrier subject to the provisions of this chapter may", as an alternative to filing a complaint with the Commission under Section 13(1), "bring suit in his * * * behalf for the recovery of the damages for which such common carrier may be liable under the pro-

damages court could not itself determine in the first instance whether the rate was unreasonable. That was an issue within the Commission's primary jurisdiction. It was in this context that the Court termed the administrative determination of unreasonableness "conclusive" (p. 258). Plainly, the Court meant "conclusive" in the sense that a district court could not redetermine *de novo* the reasonableness of a rate or hear evidence on the point, as it might with respect to issues not within the primary jurisdiction of the agency. Since the suit was not one to enforce an agency order, *Mitchell* did not involve the issue whether an enforcement proceeding is an appropriate method of judicial review of the underlying administrative determination. As we have seen, this Court has assumed that it is; next, we show that the assumption is well founded.

2. No feature of the enforcement action is inconsistent with the inference that Congress intended it as the exclusive method whereby the carrier could challenge the validity of a reparations order. It is well adapted to provide complete judicial review of such orders.

(*a*) Although, under what we believe is the proper procedure, the carrier is not permitted to take the

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visions of this chapter in any district court of the United States of competent jurisdiction". In such an action, the court must normally make reference to the ICC for a determination of whether the Act has in fact been violated (*United States* v. *Western Pac. R. Co.*, *supra*), as in similar actions in the Court of Claims involving the United States as a shipper (*e.g.*, *Pennsylvania R. Co.* v. *United States*, *supra*).

initiative in seeking review of a reparations order, the shipper must bring an enforcement action within one year of the agency's order or lose all right to enforce it (see p. 20, *supra*). This ensures that the carrier will receive reasonably prompt judicial determination of his liability under the order. And he incurs no penalty for failing to comply with the administrative order in the meantime.

(*b*) Review in an enforcement action is before a single district judge. If the carrier were permitted to bring a direct review action to challenge an ICC reparations order, such action would also be brought before a single federal district judge, not a three-judge court as in the case of other orders. See p. 21, *supra*. Thus, an enforcement action provides the same kind of review as is normally available in challenging orders of this sort. In the case of reparations orders of the Maritime Commission, to be sure, any direct review proceeding would have to be brought in a court of appeals, whereas enforcement actions lie in the district court. But the district court's judgment in the enforcement action would be reviewable by a court of appeals. So, in either case, the carrier would be able to obtain court of appeals review of the agency's determination.

The fact that enforcement actions may also be brought in State courts of general jurisdiction may seem more troublesome. However, such State-court actions seem to be rare, probably because the shipper does not enjoy all of the special procedural advantages (see p. 20, *supra*) unless he sues in a federal

district court. In addition, such actions would appear to be removable in every case to the nearest federal district court at the carrier's option.[22] There is in any event no anomaly in permitting a State court to review ICC or Maritime Commission determinations. State courts are often empowered to enforce federal rights of action. See, *e.g.*, 45 U.S.C. 56 (Employers' Liability Act). No issue is presented here of the power of a State court to set aside a federal agency's order; no such power is granted the enforcement court (see *infra*, this page). Further, since reparations orders involve only past practices, State-court jurisdiction to review such orders is unlikely to create disorder in the federal regulatory scheme, especially since any federal question decided in a State enforcement action is reviewable by this Court.

(c) Although we think that the enforcement court is empowered to declare the agency's reparations order invalid as between the parties to the action, it cannot, in our view, set aside the agency's order. This power is, under the governing statutes, granted only

[22] 28 U.S.C. 1441(a), providing that "[e]xcept as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending", seems clearly to permit removal of the State-court enforcement action. Cf. 28 U.S.C. 1445.

the direct review court.[23] If it were also enjoyed by the enforcement court, not only would the agency—contrary to the congressional intent—be brought in as a respondent (see pp. 25–26, *supra*), but other shippers entitled to take advantage of a reparations order would be foreclosed in a case where the first shipper who sued was inadequately represented and for that reason lost his case (see p. 42, *infra*).[24]

Although the result of barring the enforcement court from setting aside a reparations order is to expose the carrier to the possibility of a succession of shipper's actions arising from a single order, no instance has been suggested where a carrier was actually subjected to a burdensome multiplicity of

[23] In addition, under 28 U.S.C. 1336(b), the district court in a damages action brought directly by the shipper against the carrier, without benefit of any administrative reparations order, has jurisidiction to set aside the order of the agency determining the liability of the carrier on reference from the same court (see n. 21, pp. 30–31, *supra*, and p. 35, *infra*). This would indicate that the enforcement court in an action to enforce a reparations order, not having been granted any such power expressly, does not enjoy it.

[24] This danger would not arise in the case of a damages action brought by the shipper against the carrier directly (*i.e.*, without the shipper's first obtaining a reparations order from the agency), where 28 U.S.C. 1336(b) authorizes the damages court to set aside the agency's determination made on reference from the court. Such determination adjudicates the rights specifically of the parties to the damages suit, and could in no event provide a basis for other shippers to sue upon.

such actions.[25] At all events, there is nothing novel or unfair in the notion that a law violator may be subject to a plurality of lawsuits arising from a single wrong, if the wrong injures more than one person. Indeed, Section 9 of the Interstate Commerce Act permits shippers to sue carriers for damages without first going to the agency for a reparations order (in such a case, the court where the suit is brought refers to the ICC the question whether the carrier acted illegally), and 28 U.S.C. 1336(b) provides that in such actions the damages court is the only court that can review the validity of the agency's determination.

Nor is there any appreciable danger to uniformity in the rights and obligations of shippers if no court may set aside an agency reparations order. Such orders are not addressed to current or future condi-

[25] In the case of ICC orders, the position of the court below would be just as likely to lead to a multiplicity of suits. It is frequently the case that a single joint rate charged a large shipper gives rise to a reparations order against a number of different carriers. If the position of the court below were sustained, in such situations each carrier could bring a separate suit to set aside the agency's order. It should be noted that in the case of Maritime Commission orders, this particular danger would be obviated by the provisions of 28 U.S.C. 2112(a), which requires consolidation in a single court of appeals of multiple review proceedings arising from a single agency order. This provision does not apply, however, to district court review proceedings, as in ICC cases. See 28 U.S.C. 2112(d).

tions and do not require any shipper or carrier to take or refrain from any action. They simply create a right to recover damages for past harms. Moreover, the enforcement court has no power to determine, even for the past, the rights and duties of the parties, but is limited to reviewing the findings and conclusions of the agency to ensure that they are in conformity with law and supported by substantial evidence.[26]

(*d*) There is no unfairness in the fact that, to obtain judicial review of a reparations order, the carrier must risk a proceeding in which Congress has given the shipper a distinct procedural edge. If the carrier indeed has a meritorious defense, he will not be liable for the shipper's attorney fee, and the only disadvantage under which he labors (besides costs) is that the venue of the action is selected by the shipper.[27] This simply recognizes that, since the shipper is in general apt to be more localized and the carrier more dispersed in its operations, it is fair that the carrier should be required to defend in a forum convenient to the shipper, rather than vice versa. That the carrier must pay a reasonable attorney's fee to the shipper

[26] Although new evidence may be introduced in the enforcement action, it is limited to issues *not* within the primary jurisdiction of the agency. *Mitchell Coal Co.* v. *Pennsylvania R.R. Co.*, 230 U.S. 247, 258.

[27] The fact that the agency's order is *prima facie* evidence of the facts found by the agency would not appear a significant disadvantage from the carrier's viewpoint, since in a direct review proceeding the court would be required to uphold the agency's findings if they were supported by substantial evidence.

if the shipper wins should encourage carriers to comply with agency reparations orders where they have no meritorious defense; it will not discourage them from raising such defenses.

II

WHERE THE SHIPPER BRINGS A DIRECT REVIEW PROCEEDING CHALLENGING THE ADEQUACY OF THE AGENCY'S REPARATIONS ORDER, AND THE CARRIER INTERVENES AND CONTENDS THAT THE ORDER SHOULD BE SET ASIDE, THE REVIEWING COURT HAS JURISDICTION TO SET IT ASIDE

For the reasons already stated, we think a carrier may not bring a direct review proceeding to set aside a reparations order. But the court of appeals' jurisdiction to set aside the order in this case may be sustained on a narrower ground, to which the court below alluded: that where the shipper brings a direct review proceeding, as he is entitled to do, contending that the reparations order is inadequate, and the carrier intervenes and contends that the order is invalid and should be set aside in its entirety, the reviewing court has jurisdiction to pass upon the latter contention. In such a case, as the court below stated, "the order should be reviewable in its entirety, and the rights of all parties considered" (R. 661).

A. The jurisdiction of the reviewing court having been properly invoked by the shipper, an independent basis of jurisdiction is not necessary to enable the court to entertain the carrier's challenge to the validity of the order

By its order of March 28, 1961, the Board awarded Consolo reparations for Flota's discriminatory re-

fusal to grant him a fair share of banana cargo space, but in an amount less than he had claimed. Consolo petitioned the court below under Section 2(c) of the Hobbs Act to set aside so much of the Board's order as denied reparations in the larger amount which he claimed and to direct the Board to enter an order for such larger amount. This petition by the shipper challenging the reparations award as inadequate properly invoked the jurisdiction of the court of appeals. See *D. L. Piazza Co.* v. *West Coast Line,* 210 F. 2d 947 (C.A. 2), certiorari denied, 348 U.S. 839; *Swift & Company* v. *Federal Maritime Commission,* 306 F. 2d 277 (C.A. D.C.); *States Marine Lines, Inc.* v. *Federal Maritime Commission,* 313 F. 2d 906 (C.A. D.C.), certiorari denied, 374 U.S. 831; cf. *United States* v. *Interstate Commerce Commission,* 337 U.S. 426.

Flota, which had been a respondent in the proceedings before the Board, intervened in Consolo's review proceedings in the court of appeals, contending that the award was invalid and should be set aside in its entirety (R. 652–653). Since Flota was a "party * * * in interest in the proceeding before the agency whose interests will be affected if an order of the agency is or is not enjoined, set aside, or suspended" (Section 8 of the Hobbs Act, 5 U.S.C. 1038), its intervention in Consolo's review proceeding was "as of right" (*ibid.*). In cases where "intervention is a matter of right, the intervenor's claim is ancillary to the pending action, and jurisdiction over the principal action sustains jurisdiction over this ancillary

claim."[28] Indeed, the present case is *a fortiori* to those holding that jurisdiction over the main cause supports jurisdiction over a compulsory counterclaim that lacks an independent ground of jurisdiction;[29] an affirmative award may be made on a counterclaim, while here Flota was merely defending against the award granted Consolo.[30]

B. Considerations of procedural economy and fairness support application of the ancillary-jurisdiction doctrine here; the policies which we have argued make the enforcement action normally the exclusive method of reviewing reparations orders are not opposed

Where the shipper brings a direct review proceeding attacking the adequacy of the agency's reparations award, occasionally the court of appeals may, in passing on his contention, directly or by implication rule that he is entitled to no reparations whatever. Suppose, for example, that the shipper argued that the carrier had overcharged him by two cents a barrel, rather than one (as the agency had found), and the court concluded that in fact he had not been overcharged at all; the shipper probably would be

[28] 1 Moore, *Federal Practice* (2d ed.), p. 824; 4 id., § 24.18; *White* v. *Ewing*, 159 U.S. 36; *Moore* v. *New York Cotton Exchange*, 270 U.S. 593; *Eichel* v. *United States Fidelity & Guaranty Co.*, 245 U.S. 102; *Lenz* v. *Wagner*, 240 F. 2d 666 (C.A. 5); *Park & Tilford* v. *Schulte*, 160 F. 2d 984 (C.A. 2).

[29] See, *e.g.*, *Moore* v. *New York Cotton Exchange*, *supra*.

[30] In addition to intervening as of right in the proceeding brought by Consolo, Flota filed its own petition to review and set it aside. We do not think, however, that a separate petition was necessary to raise the defense of invalidity and confer jurisdiction on the court to set the reparations order aside in its entirety.

barred by *res judicata* from bringing an enforcement suit based on the reparations order. Generally, however, issues of damages raised in a shipper's action to increase the award can—as in the present case—be determined without completely foreclosing the shipper from seeking damages in an enforcement action. And in that event barring the carrier from challenging the validity of the reparations order in the direct review proceeding produces an unnecessary and undesirable fragmentation of judicial review.

Fundamental considerations of judicial economy require that, if possible, all of the issues arising from a single transaction between the same parties be decided in one proceeding, not several. This is the premise of rules allowing counterclaims and pendent and other forms of ancillary jurisdiction. While it might be possible to decide reparations review proceedings in two stages—the first concerned with whether the agency's award should be increased, and the second with whether the award should be decreased or denied altogether—the division is highly artificial. It is simpler, more practical, more expeditious, and more efficient to review the order, not piecemeal, but in a single proceeding.

A similar principle of economy underlines 28 U.S.C. 1336(b), which provides that in a damages suit, where a reference must be made to the Interstate Commerce Commission, the damages court shall have exclusive jurisdiction to review the order of the Commission arising from the reference. Prior to the enactment of this provision, as illustrated by *Pennsyl-*

vania R. Co. v. *United States*, 368 U.S. 202, *supra*, pp. 29–30, a party to the damages suit desiring judicial review of the Commission's order was required to bring a separate review proceeding. This procedure was cumbersome and duplicative, and Congress changed it. The same policy justifies applying the traditional doctrine of ancillary jurisdiction to the situation presented by the instant case.

If precluded from challenging the validity of the reparations order in a direct review proceeding brought by the shipper, the carrier must defend itself against the order in two separate judicial proceedings. First, it must intervene in the shipper's direct review proceeding. Otherwise it may later be confronted in the enforcement action with a reparations order in an amount larger than that originally entered by the agency. But if the carrier defends successfully in the direct review action, that will ordinarily mean only that it has succeeded in holding the line at the amount of reparations awarded the shipper by the agency. It must still defend against the order in an enforcement action brought by the shipper. Absent strong reasons, it seems improper to subject the carrier to this redundant defensive procedure.

No strong reasons are apparent; the considerations of policy that led us to urge that the carrier is not permitted to institute a direct review proceeding to challenge a reparations order are not applicable here. Congress has conferred special procedural advantages upon the shipper only with respect to an action to enforce the reparations order issued by the agency,

not in actions to obtain a greater award than the agency deemed justified. Concededly, if the shipper is dissatisfied with the agency's order, and desires to have the amount of the award increased, he must, before instituting the enforcement action, bring a direct review proceeding challenging the adequacy of the order. It is not a substantial added burden upon him to defend the validity of the order in the proceeding he has brought, as well as attack its adequacy.

In an enforcement action, the only parties are the shipper and the carrier; therefore, the court's finding that the reparations order is invalid is binding only on the parties. Other shippers are free to sue the carrier on the order. *Phillips* v. *Grand Trunk W. Ry.*, 236 U.S. 662, 665; *Mitchell Coal Co.* v. *Pennsylvania R.R. Co.*, 230 U.S. 247, 258. However, where the carrier's defense of invalidity is raised in a shipper's action to increase the reparations award, the agency is the respondent. Ordinarily, in a direct review (as contrasted with an enforcement) proceeding, the court sets aside the agency's order if it finds it invalid. We find no compelling reasons of policy for denying the reviewing court that power here. To be sure, if a reparations order is set aside, not only the shipper who brought the proceeding, but all other shippers in whose favor the order ran, would be precluded from enforcing it. But they would also be precluded from enforcing it if the one shipper succeeded in having it set aside as inadequate, so that such risk already inheres in the suit. No problem is presented of injecting the agency as a party in proceedings where it

properly should play a less active role. The agency is already in the case as a party: it is the respondent in the shipper's direct review proceeding. Finally, unless the carrier is able to get the order set aside (assuming he establishes its invalidity), he faces the prospect of a succession of shippers' review, as well as enforcement, actions.[31]

III

WHETHER OR NOT AN AWARD OF REPARATIONS IS ALWAYS MANDATORY WHERE A VIOLATION OF LAW IS FOUND AND DAMAGES PROVED, THE AGENCY'S AWARD OF REPARATIONS IN THIS CASE WAS JUSTIFIED AND THE COURT OF APPEALS ERRED IN SETTING IT ASIDE

A. Petitioner argues that the Maritime Commission has no discretion to deny reparations on equitable grounds; that where a violation is proved and damages shown, the injured party has an absolute right to a reparations order. It is not necessary to decide this question in the present case. Normally, of course, where damages are shown, reparations should be awarded; the purpose of the reparations procedure, after all, is to afford an administrative damages remedy to the injured party. However, petitioner himself appears to concede (Pet. 11) the propriety of an agency's denying reparations, in cases where retroactive application of a new rule of law would be harsh or inequitable, by simply declaring a practice unlawful for the future only. See, *e.g.*, *Johnston Seed Co.*

[31] With respect to ICC—not Maritime Commission—orders. See n. 25, p. 35, *supra*.

v. *United States,* 90 F. Supp. 358 (W.D. Okla.), affirmed, 191 F. 2d 228 (C.A. 10); *Boston Wool Trade Ass'n* v. *Director General,* 69 I.C.C. 282, 309. We need not explore the outer bounds of the agency's discretion thus to withhold reparations on equitable grounds. For here the agency did award damages; and we submit that the court of appeals erred in holding that the agency's refusal to withhold damages on equitable grounds was unsupported by substantial evidence.

Although we believe that the court erred, we present only a brief statement of our views on the question. We have argued that the Commission in a reparations case was given the role of arbiter in a basically private controversy—that it was not meant to be a party to the controversy. The statutory scheme contemplates that the main burden of defending an agency reparations order shall be borne by the shipper. Applying that principle here, we leave the argument on the merits of the court of appeals' result to be made principally by petitioner.[32]

B.1. When Flota agreed in May 1957 to the renewal of the exclusive contract, the Board had rendered two decisions involving the carriage of bananas by Flota's

[32] Although the agency is a proper party here because this is a shipper's proceeding in which the carrier intervened and sought to have the reparations order set aside in its entirety (see pp. 42–43, *supra*), the issue on the merits has importance only to the particular private parties to the suit. Flota does not challenge the underlying validity of the Commission's order, but only the equities of granting this particular shipper, Consolo, reparations for Flota's concededly unlawful acts.

competitor, Grace Line, in the very same trade between Ecuador and North Atlantic ports—one in 1953, *Philip R. Consolo* v. *Grace Line Inc.*, 4 F.M.B. 293, the other in April 1957, *Banana Distributors, Inc.* v. *Grace Line, Inc.*, 5 F.M.B. 278. The Board had made a study of banana carriage in depth, and had held in these cases that a carrier could not pick and choose among qualified banana shippers.[33] Although it knew of these decisions, Flota was willing to take the risk of going ahead with its exclusive contract with Panama Ecuador for a three-year term.[34] Its

[33] The Board was applying the familiar doctrine that where demand for space exceeds the supply, the common carrier must equitably pro-rate the available space among the shippers. *Pennsylvania R.R. Co.* v. *Puritan Coal Co.*, 237 U.S. 121; *Patrick Lumber Co.* v. *Calmar SS. Corp.*, 2 U.S.M.C. 494.

[34] It is, of course, true that on review, the Second Circuit in 1959 reversed and remanded the Board's 1957 decision in *Banana Distributors* because it did not accept the test announced in the Board's report as the proper basis for holding Grace Line to be a common carrier of bananas (*Grace Line, Inc.* v. *Federal Maritime Board*, 263 F. 2d 709, 711 (C.A. 2)). On remand, however, the Board reached the same result, 5 F.M.B. 615, and the court affirmed (*Grace Line, Inc.* v. *Federal Maritime Board*, 280 F. 2d 790 (C.A. 2), certiorari denied, 364 U.S. 933). Moreover, Flota's protestations must be judged in the context of circumstances as they existed in May 1957, when it renewed the exclusive contract. At that time the agency with primary responsibility in the field had declared illegal the discriminatory exclusion of qualified banana shippers (R. 505). And there is nothing to indicate that Flota believed that the Board's 1957 decision was bad law and would be reversed. On the contrary, Flota began its defense before the Board by "assuming that the Grace Line decision is good, valid law, and we are not attacking that in any manner, shape, or form" (R. 134). Flota instead relied on the physical differences between its ships and Grace's in arguing to the Board that the *Grace Line* decision was not applicable to it. At all events, Flota was taking a "calculated

violation of law was thus a knowing one.[35]

2. Flota refused to break its contract with Panama Ecuador and grant Consolo reefer space, not because of genuine concern that breach of the contract might lay it open to a suit for damages in the event the exclusive feature of the contract was held legal, but solely because of the advantages Flota believed the contract would provide. Flota's operating manager in the United States testified: "[I]t is better to deal with one [shipper] than with three"; he said Flota would have "to make more money" to overcome the disadvantages of dealing with three (R. 162). Flota's board of directors was eager to renew the contract with Panama Ecuador in May 1957 since, among other things, Flota had been able to settle Panama Ecuador's claims for shipment damage on a basis of only "2.4% which is a very low percentage in comparison with the usual 15% deduction which applies to this type of transportation" (R. 196). Flota's general manager testified that Flota had "had no difficulties or troubles whatsoever" under its 1955 exclusive contract with Panama Ecuador, and "'consequently the

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risk" that the Board's ruling in the *Grace line* case would be affirmed (R. 506). As between the innocent shipper who was injured by the carrier's discriminatory denial of space, and the guilty carrier, it was plainly no abuse of discretion to refuse the carrier's request to pass "the burden of its wrongdoing on to the party who bore the pecuniary brunt thereof" (*ibid.*).

[35] The court below reasoned that Flota may well have thought that the Board's earlier decisions relating to the banana carriage were distinguishable. In any event, however, Flota plainly took a calculated risk that the Board and the courts would—as proved to be the case—find that they were *not* distinguishable from its case.

board of directors believed it very suitable, very convenient to extend the contract" (R. 434; see, also, Ex. 18, R. 195; Minutes No. 482, R. 198–199).

At all events, any legal dilemma Flota may have faced in having to decide whether to breach its contract with Panama Ecuador in order to serve Consolo was much less acute than the court below thought. By 1958, Flota had an independent ground for cancelling the contract. For in that year Panama Ecuador threatened to cancel unless Flota reduced its freight rates. Instead of terminating the contract at that time, as it could have done, Flota granted the requested reduction—though considering the request legally unjustified—because it thought that on balance it could make more money by continuing at reduced rates with Panama Ecuador than by opening its reefer space to other qualified shippers (R. 199–204, 499–500).

3. The court below reasoned that Flota, beset by justifiable doubts regarding its obligation, promptly sought a declaratory ruling from the Board and the Board unjustifiably delayed in issuing such a ruling; and, further, that regardless of the cause of the delay "it would be inequitable to make Flota pay for the Board's delay in reaching a conclusion" (R. 697). The court plainly erred in holding that Flota could absolve itself of responsibility for illegally inflicting pecuniary injury on the shipper by pointing to alleged administrative delay.[36] But there was in any

[36] In analogous cases involving the Labor Board, it has been held that back pay may not be denied employees wrongfully discharged or refused employment, even though the reparations period included two and one-half years during which the Labor Board, "[u]nfortunately", was considering the case. *National*

event no unreasonable or unnecessary delay; and to the extent that there was delay, Flota bears much of the responsibility. Flota's petition for a declaratory order (R. 37) was not filed with the Board until October 30, 1957, more than five months after it had executed the renewal contract with Panama Ecuador in violation of the Shipping Act (R. 659, 687). Thus, as the Commission noted (R. 507), Flota in filing the petition was not requesting guidance as to the course of action it should pursue in light of the Board's April 29, 1957 *Grace Line* decision; it had already decided to act in disregard of that decision. The petition was filed, moreover, only after Consolo warned that he would file a complaint with the Board if a fair share of space was not granted him by November 15.

Labor Relations Board v. *Electric Cleaner Co.*, 315 U.S. 685, 697–698. See, also, *National Labor Relations Board* v. *Pool Mfg. Co.*, 339 U.S. 577, *National Labor Relations Board* v. *American Creosoting Co.*, 139 F. 2d 193 (C.A. 6), certiorari denied, 321 U.S. 797; *National Labor Relations Board* v. *Wilson Line*, 122 F. 2d 809 (C.A. 3). So also, the injured shipper has been held entitled to reparations from the wrongdoing carrier even though the reparations period included some three and one-half years during which proceedings were pending before the Interstate Commerce Commission, and despite the fact that at one time during that period the Commission had ruled that no reparations should be assessed at all, a decision which the Commission reversed five years later. *Louisville & Nashville Railroad Co.* v. *Sloss-Sheffield Co.*, 269 U.S. 217. It is not necessary, in such a case, to establish that the carrier "benefited" from its illegal exclusion of the injured shipper. The carrier's liability arises from the wrongful loss inflicted upon the shipper, "not out of the unlawful receipt or unjust enrichment by the carrier" (269 U.S. at 234). See, also, *McLean* v. *Denver & Rio Grande R.R. Co.*, 203 U.S. 38; *Roberto Hernandez, Inc.* v. *Arnold Bernstein*, 116 F. 2d 849 (C.A. 2), certiorari denied, 313 U.S. 582.

Flota's petition, filed two weeks before Consolo's complaint, raised many of the same legal and factual issues, and the Board was entitled to consolidate them for hearing. Moreover, as the Commission pointed out, even without consolidation Flota's petition "would have offered no promise of a speedy resolution of the controversy" (R. 508). The issues raised by the petition could be determined only after notice and a hearing. And, in filing and prosecuting its petition, Flota conceded nothing, requested a full hearing, and strenuously insisted that it was not a common carrier, that its exclusive contract was lawful, and that in any event the Board's *Grace Line* decision was inapplicable (R. 508). On this last point, Flota relied, among other things, on alleged structural differences between its vessels and Grace's which Flota claimed required it to deal with Panama Ecuador exclusively. This factual contention "led to a complex and lengthy hearing into the physical characteristics and utilization of [Flota's] vessels so far as the banana trade was concerned", and precluded "prompt disposition of the controversy" (R. 508).

Flota requested an extension of time to answer Consolo's complaint and additional time was granted (R. 49–52). On January 9, 1958, Flota acknowledged to the Board that Consolo's complaint "raises precisely the same issues which" Flota seeks "to have adjudicated in [its] petition" and asked the Board what action would be taken in connection with its petition (R. 56). On March 31, 1958, Consolo requested an early pre-hearing conference (R. 57). However, on

April 2, 1958, Flota asked to postpone the pre-hearing conference to the week of May 5 (R. 57–58). On April 4, 1958, Flota wrote the Board stating that an appeal was pending in the Second Circuit in the *Grace Line* case and "that [this] is a further reason why there should be a delay in *any* pretrial conference" (R. 61; emphasis supplied). The Board denied this request; had it granted it, there would have been at least a two-year delay in the disposition of the matter.

On May 1, 1958, the Board assigned a docket number to Flota's petition and consolidated it with Consolo's complaint (R. 63). The Board set the date of the hearing before the Examiner for September 22, 1958 (R. 65). (Flota was unwilling to proceed to hearing prior to September (R. 554–555).) On August 8, 1958, Flota applied for a postponement of the hearing to December 1, 1958 (R. 66), stating that such a postponement "cannot in any manner be detrimental to the interests" of Consolo (R. 68), but the Board granted postponement only to November 3, 1958 (R. 70). The Examiner's decision on the issue of violation (Recommended Decision of February 4, 1959, R. 17) was filed three weeks after he received the parties' briefs; the Board's decision (Decision of June 22, 1959) was filed six weeks after it heard oral argument (R. 509).[37]

[37] Since the period for which reparations were assessed ended on July 12, 1959 (the date for compliance with the Board's order of June 22, 1959) and no interest was assessed, no prejudice resulted to Flota from the fact that the trial on the reparations issue did not take place until after June 1959.

4. The Commission observed that Flota "has received all possible recognition, as evidenced by the fact that the reparation figure has been successively reduced so that it is now substantially less than half the amount the Examiner awarded" (R. 513). The Board could have assessed interest as damages from the time of the arrival of each vessel from which Consolo was unlawfully excluded. *Louisville & Nashville Railroad Co.* v. *Sloss-Sheffield Co.*, 269 U.S. 217. The Examiner so recommended, yet the Board in its discretion decided not to impose such interest. The Board could have held that Consolo was entitled to one-third of the available banana space during the reparations period, as had been recommended by the Examiner, since there were only three qualified shippers during that period. Yet the Board held that Consolo was entitled to only 18.46% of the space, a determination based on the space allocated to him after the reparations period. This holding had the effect of reducing the amount of reparations substantially. The net effect of these and other adjustments was to reduce the Examiner's recommended award of $259,812.26, plus interest from the date of arrival of each vessel during the reparations period, to only $106,001, without any interest.[38]

[38] An additional point requires brief mention. The court thought that "Consolo's position is hardly deserving of greater sympathy than Flota's", because the only "pecuniary brunt" he suffered was a loss of "unrealized profits" (*i.e.*, the profits he would have made had Flota carried his bananas), and because for several years prior to April 1957 Consolo had received preferential treatment from Grace Line (R. 698). But the loss

In short, the record shows that the Commission was amply justified in finding (*a*) that Flota took a knowing and calculated risk, when it refused to grant reefer space to Consolo, that its conduct would be held unlawful; (*b*) that it did so, not because it was honestly concerned with avoiding a breach of a lawful contract with Panama Ecuador, but because it preferred the advantages of the one-shipper arrangement; (*c*) that when Flota did seek a determination of the legal question from the Board, the Board acted as expeditiously as the circumstances—including Flota's own frequent requests for delay—permitted; (*d*) that in the computation of damages, the Board was most careful to eliminate all items of damage that might conceivably have been inequitable to impose on Flota; (*e*) and that, in sum, considering all of the circumstances, the equities weighed more strongly in favor of Consolo—the innocent and injured shipper—than Flota, whose good faith was doubtful and whose unlawful conduct was conceded. We submit that the court below should not have disturbed the Commission's determination.

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of unrealized profits caused by the common carrier's unlawful refusal to carry the shipper's goods is the proper, and indeed the only adequate, measure of the shipper's damages. *McLean* v. *Denver & Rio Grande R. R. Co.*, 203 U.S. 38; *Roberto Hernandez, Inc.* v. *Arnold Bernstein*, 116 F. 2d 849 (C.A. 2), certiorari denied, 313 U.S. 582. The fact that Consolo had earlier received preferential treatment from Grace cannot absolve Flota from paying reparations for the injury it later inflicted upon Consolo. Surely, any preference received by Consolo from a different carrier during an earlier time period did not forever place him outside the protection of the Shipping Act.

CONCLUSION

While the court of appeals had jurisdiction to set aside the Commission's reparations order, it erred in so doing here. The decision below should therefore be reversed.

Respectfully submitted.

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APPENDIX

The Shipping Act, 1916, 39 Stat. 728, as amended, 46 U.S.C. 801 *et seq.*, provides:

Section 14 (46 U.S.C. 812):

* * * * *

Fourth. Make any unfair or unjustly discriminatory contract with any shipper based on the volume of freight offered, or unfairly treat or unjustly discriminate against any shipper in the matter of (a) cargo space accommodations or other facilities, due regard being had for the proper loading of the vessel and the available tonnage; (b) the loading and landing of freight in proper condition; or (c) the adjustment and settlement of claims.

Section 16 (46 U.S.C. 815):

* * * * *

It shall be unlawful for any common carrier by water, or other person subject to this chapter, either alone or in conjunction with any other person, directly or indirectly—

First. To make or give any undue unreasonable preference or advantage to any particular person, locality, or description of traffic in any respect whatsoever, or to subject any particular person, locality, or description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever:

* * * * *

Section 22 (46 U.S.C. 821):

Any person may file with the Federal Maritime Board a sworn complaint setting forth any violation of this chapter by a common carrier by water, or other person subject to this chapter, and asking reparation for the injury, if any, caused thereby. The Board shall furnish a copy of the complaint to such carrier or other person, who shall, within a reasonable time specified by the Board, satisfy the complaint or answer it in writing. If the complaint is not satisfied the Board shall, except as otherwise provided in this chapter, investigate it in such manner and by such means, and make such order as it deems proper. The Board, if the complaint is filed within two years after the cause of action accrued, may direct the payment, on or before a day named, of full reparation to the complainant for the injury caused by such violation.

* * * * *

Section 29 (46 U.S.C. 828):

In case of violation of any order of the Federal Maritime Board, other than an order for the payment of money, the Board, or any party injured by such violation, or the Attorney General, may apply to a district court having jurisdiction of the parties; and if, after hearing the court determines that the order was regularly made and duly issued, it shall enforce obedience thereto by a writ of injunction or other proper process, mandatory or otherwise.

Section 30 (46 U.S.C. 829):

In case of violation of any order of the Federal Maritime Board for the payment of money the person to whom such award was made may file in the district court for the district in which such person resides, or in which is located any office of the carrier or other person to whom the order was directed, or in which is located any point of call on a regular route operated by the

carrier, or in any court of general jurisdiction of a State, Territory, District, or possession of the United States having jurisdiction of the parties, a petition or suit setting forth briefly the causes for which he claims damages and the order of the Board in the premises.

In the district court the findings and order of the Federal Maritime Board shall be prima facie evidence of the facts therein stated, and the petitioner shall not be liable for costs, nor shall he be liable for costs at any subsequent stage of the proceedings unless they accrue upon his appeal. If a petitioner in a district court finally prevails, he shall be allowed a reasonable attorney's fee, to be taxed and collected as part of the costs of the suit.

All parties in whose favor the Federal Maritime Board has made an award of reparation by a single order may be joined as plaintiffs, and all other parties to such order may be joined as defendants, in a single suit in any district in which any one such plaintiff could maintain a suit against any one such defendant. Service of process against any such defendant not found in that district may be made in any district in which is located any office of, or point of call on a regular route operated by, such defendant. Judgment may be entered in favor of any plaintiff against the defendant liable to that plaintiff.

No petition or suit for the enforcement of an order for the payment of money shall be maintained unless filed within one year from the date of the order.

Section 31 (46 U.S.C. 830):

The venue and procedure in the courts of the United States in suits brought to enforce, suspend, or set aside, in whole or in part, any order of the Federal Maritime Board shall, except as otherwise provided, be the same as in similar suits in regard to orders of the Inter-

state Commerce Commission, but such suits may also be maintained in any district court having jurisdiction of the parties.

The Administrative Orders Review Act (Hobbs Act), 64 Stat. 1129, 5 U.S.C. 1031 *et seq.*, provides:

Section 2 (5 U.S.C. 1032):

> The court of appeals shall have exclusive jurisdiction to enjoin, set aside, suspend (in whole or in part), or to determine the validity of, * * * (c) such final orders of the United States Maritime Commission or the Federal Maritime Board or the Maritime Administration entered under authority of the Shipping Act, 1916, as amended * * * as are now subject to judicial review pursuant to the provisions of section 830 of Title 46 * * *.

Section 3 (5 U.S.C. 1033):

> The venue of any proceeding under this chapter shall be in the judicial circuit wherein is the residence of the party or any of the parties filing the petition for review, or wherein such party or any of such parties has its principal office, or in the United States Court of Appeals for the District of Columbia.

Section 8 (5 U.S.C. 1038):

> * * * The agency, and any party or parties in interest in the proceeding before the agency whose interests will be affected if an order of the agency is or is not enjoined, set aside, or suspended, may appear as parties thereto of their own motion and as of right, and be represented by counsel in any proceeding to review such order. * * *

The Judicial Code, 28 U.S.C. 1 *et seq.*, provides:

Section 1336:

> (a) Except as otherwise provided by Act of Congress, the district courts shall have jurisdiction of any civil action to enforce, enjoin,

set aside, annul or suspend, in whole or in any part, any order of the Interstate Commerce Commission.

(b) When a district court or the Court of Claims refers a question or issue to the Interstate Commerce Commission for determination, the court which referred the question or issue shall have exclusive jurisdiction of a civil action to enforce, enjoin, set aside, annul, or suspend, in whole or in part, any order of the Interstate Commerce Commission arising out of such referral.

(c) Any action brought under subsection (b) of this section shall be filed within 90 days from the date that the order of the Interstate Commerce Commission becomes final.

Section 1398(a):

Except as otherwise provided by law, any civil action to enforce, suspend or set aside in whole or in part an order of the Interstate Commerce Commission shall be brought only in the judicial district wherein is the residence or principal office of any of the parties bringing such action.

Section 2321:

The procedure in the district courts in actions to enforce, suspend, enjoin, annul or set aside in whole or in part any order of the Interstate Commerce Commission other than for the payment of money or the collection of fines, penalties and forfeitures, shall be as provided in this chapter.

Section 2323:

* * * * *

The Interstate Commerce Commission and any party or parties in interest to the proceeding before the Commission, in which an order or requirement is made, may appear as parties of their own motion and as of right, and be represented by their counsel, in any action involving the validity of such order or require-

ment or any part thereof, and the interest of such party.

Section 2325:

An interlocutory or permanent injunction restraining the enforcement, operation or execution, in whole or in part, of any order of the Interstate Commerce Commission shall not be granted unless the application therefor is heard and determined by a district court of three judges under section 2284 of this title.

The Interstate Commerce Act, 24 Stat. 379, as amended, 49 U.S.C. 1 *et seq.*, provides:

Section 13(1):

Any person, firm, corporation, company, or association, or any mercantile, agricultural, or manufacturing society or other organization, or any body politic or municipal organization, or any common carrier complaining of anything done or omitted to be done by any common carrier subject to the provisions of this chapter in contravention of the provisions thereof, may apply to said Commission by petition, which shall briefly state the facts; whereupon a statement of the complaint thus made shall be forwarded by the Commission to such common carrier, who shall be called upon to satisfy the complaint, or to answer the same in writing, within a reasonable time, to be specified by the Commission. If such common carrier within the time specified shall make reparation for the injury alleged to have been done, the common carrier shall be relieved of liability to the complainant only for the particular violation of law thus complained of. If such carrier or carriers shall not satisfy the complaint within the time specified, or there shall appear to be any reasonable ground for investigating said complaint, it shall be the duty of the Commission to investigate the matters complained of in such manner and by such means as it shall deem proper.

Section 16(1):

If, after hearing on a complaint made as provided in section 13 of this title, the Commission shall determine that any party complainant is entitled to an award of damages under the provisions of this chapter for a violation thereof, the Commission shall make an order directing the carrier to pay to the complainant the sum to which he is entitled on or before a day named.

Section 16(2):

If a carrier does not comply with an order for the payment of money within the time limit in such order, the complainant, or any person for whose benefit such order was made, may file in the district court of the United States for the district in which he resides or in which is located the principal operating office of the carrier, or through which the road of the carrier runs, or in any State court of general jurisdiction having jurisdiction of the parties, a complaint setting forth briefly the causes for which he claims damages, and the order of the Commission in the premises. Such suit in the district court of the United States shall proceed in all respects like other civil suits for damages, except that on the trial of such suit the findings and order of the Commission shall be prima facie evidence of the facts therein stated, and except that the plaintiff shall not be liable for costs in the district court nor for costs at any subsequent stage of the proceedings unless they accrue upon his appeal. If the plaintiff shall finally prevail he shall be allowed a reasonable attorney's fee, to be taxed and collected as a part of the costs of the suit.

Section 16(3)(f):

A complaint for the enforcement of an order of the Commission for the payment of money shall be filed in the district court or the State

court within one year from the date of the order, and not after.

Section 16(12):

If any carrier fails or neglects to obey any order of the Commission other than for the payment of money, while the same is in effect, the Interstate Commerce Commission or any party injured thereby, or the United States, by its Attorney General, may apply to any district court of the United States of competent jurisdiction for the enforcement of such order. If, after hearing, such court determines that the order was regularly made and duly served, and that the carrier is in disobedience of the same, such court shall enforce obedience to such order by a writ of injunction or other proper process, mandatory or otherwise, to restrain such carrier, its officers, agents, or representatives, from further disobedience of such order, or to enjoin upon it or them obedience to the same.

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